(10)

No. 96-1925

In The Supreme Court of the United States

October Term, 1997

Caterpillar, Inc.,
Petitioner,

v.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its affiliated Local Union 786,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

For many years, the respondent UAW and various of its local unions, including respondent Local 786 (collectively the "Union"), have served as the exclusive representative of the employees of petitioner Caterpillar Inc. (the "Company") at plants throughout the country including the York Pennsylvania plant which is the focus of this case. At periodic intervals, the parties have negotiated "central" collective bargaining agreements covering all of these plants, and "local supplements" covering individual plants. The last central collective bargaining agreement and local supplement covering the York plant (together referred to as the "Collective Bargaining Agreement" or the "Agreement") was consumated in 1988 and expired in 1991; over the ensuing six years the parties have been unable to reach agreement on a new labor contract but continue to abide by many of the terms of the expired Agreement.

The Grievance Process and the Representational Structure—The Collective Bargaining Agreement—like its predecessor agreements and like virtually every other collective bargaining agreement—establishes a multi-step procedure to resolve "any difference which may arise between the parties, or between the Company and an employee as to . . . [a]ny matter involving the interpretation, applciation or violation of any provisions of this Agreement" or "[a]ny matter relating to wages . . . not covered by this Agreement." Joint Appendix ("J.A.") 18. This process allows grievances to be considered by successively higher levels within the Company and the Union.

The process begins with a meeting between the "aggrieved employee . . . his Steward [and] his Foreman." J.A. 45. If the grievance is not "satisfactorily adjusted" in Step 1, the "Plant Grievance Committeeman" for the "zone" in which the aggrieved employee works "take[s] the grievance to the Superintendent." *Id.* Absent a satisfactory resolu-

tion in Step 2, the grievance proceeds to Step 3 in which "the Plant Grievance Committee . . . present[s] the grievance . . . to the Labor Relations Manager." *Id.* If still not resolved, the matter goes to Step 4 in which the grievance is considered by a "Review Committee" which includes the Local Union President, the Grievance Committee Chairman, and up to four representatives of management. J.A. 46-47.[1]

The Collective Bargaining Agreement goes on to provide that if the Local Union cannot resolve the grievance after Step 4, the Local "shall refer the grievance" to the International Union. C.A. App. 54.[2] The UAW may elect to appeal the grievance to final and binding arbitration before a mutually-agreed upon Permanent Arbitrator. *Id.*

The process just described required the parties to establish within each plant what the Collective Bargaining Agreement terms "a system of Union Representation for the processing and settlement of grievances." J.A. 3. In the case of the York plant, the Agreement provides for (i) over 100 stewards to be "elected from among the employees under the supervision of each Foreman," J.A. 43; (ii) "[n]ine plant committeeman," each elected from and representing defined geographic areas and shifts within the plant, J.A. 5-6; and (iii) of particular relevance here, a "Chairman of the Grievance Committee" who also "shall be elected from among employees in the bargaining unit," J.A. 6.[3]

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[1] In Steps 3 and 4 the Local may enlist the "assist[ance]" of an "International Representative" employed by the UAW. J.A. 6.

[2] "C.A. App." refers to the joint appendix that was filed in the Court of Appeals.

[3] The Agreement also provides for one "Alternate Committeeman" who "shall be elected from among employees in the bargaining unit," and who "shall act as the Chairman of the Grievance Committee in his absence" and "assist the Chairman in conducting his business." J.A. 6, 43. The Alternate is paid on the same basis as the Chairman; like the courts below, we use the term "Chairman" to refer to both the Chairman and his Alternate.

The Collective Bargaining Agreement goes on to define the six "duties and privileges" of the Grievance Chairman as follows:

> (1) act in place of an absent Committeeman; (2) serve as a Committeeman for a specific area, plant or location . . . (3) investigate grievances pending [in] the Third and/or Final Step of the grievance procedure . . .; (4) discuss Third and/or Final Step grievances with Company representatives . . .; (5) participate in joint investigations agreed to in a Third and/or Final Step grievance meeting; (6) consult with the Regional Director of the International Union, or his designated representative, on the disposition of any grievance denied in the Third and/or Final Step of the grievance procedure . . . [J.A. 13-14]

The Chairman "shall exercise only the privileges above set forth or those which have otherwise been mutually agreed upon." J.A. 14.

The No-Docking Provisions—For many years, continuing through the 1988 Agreement, the parties' agreements permitted the Local grievance representatives—the stewards and committeemen (one of whom also served as chair of the grievance committee)—to take time off as needed, without loss of pay, to represent employees in the grievance procedure. J.A. 58. The limits on this permission were (and are) that the stewards and committeemen are required to obtain approval from their supervisor each time they need to attend to a grievance, and are not to be paid to the extent the amount of time spent is "unreasonable." J.A. 11, 12.[4]

Over time, the volume and complexity of the grievances reached the point that, *de facto*, some committeemen

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[4] Caterpillar's brief implies that stewards and committeemen are paid only for time spent "discuss[ing] the grievance with management." Pet. Br. 2. That is not the case: the Collective Bargaining Agreement provides, by its terms, that stewards are paid for time spent "discuss[ing] a grievance with the aggrieved employee" or with "the Plant Grievance Committeeman who would handle the grievance in Step 2"; and Grievance Committeeman are paid for time spent "discuss[ing] the grievance . . . with the aggrieved employee [and] with the Steward." J.A. 44.

found that they were spending full time performing their grievance-related work with little or no time left for their regular production work. J.A. 59-60; *see* J.A. 83. Since the early 1940's, the UAW had dealt with that reality in the automobile manufacturing industry by negotiating collective bargaining agreements which supplement the "as needed" leave for stewards and committeemen with contractual provisions defining a limited number of union grievance-handling positions within each plant as, *de jure*, full-time. J.A. 63.

Beginning in the early 1970's, the UAW and various companies in the agricultural implement industry came to agreements embodying the same approach. The UAW negotiated a provision for full-time employee-grievance handlers with Deere and Company in 1971, J.A. 58; with Caterpillar in 1973, J.A. 58; and with J.I. Case Corp. in 1977, J.A. 63.

Specifically, the 1973 UAW-Caterpillar collective bargaining agreement and each subsequent agreement, in addition to continuing the provisions for leave for stewards and grievance committeeman, provided for the election of an employee to serve as "full-time Chairman" of the grievance committee. J.A. 60. By denominating the position as "full time," the employee elected to be Grievance Chairman—unlike the stewards or committeemen—was allowed to spend the entire working day on grievance processing without the need continually to obtain permission from a supervisor.

Under the 1973 agreement and each succeeding collective bargaining agreement, the Grievance Chairman was paid by the Company "at the regular straight-time hourly rate he was receiving just prior to his election" for all time spent during his "regular shift hours during the regular workweek," J.A. 14, discharging "the functions of his office" as detailed in the agreement, *see* p. 3 *supra*.[5] The

[5] By limiting the Chairman's pay to "his regular shift hours," the agreements had the effect of making the Chairman ineligible for any overtime or premium pay. To compensate for this, the parties agreed in 1973, and in each succeeding contract, to provide

agreements expressly provided, however, that the Company would not pay for time spent by the Chairman on union functions "not directly related to the functions of his office," including time spent in "negotiations" and in "attendance at meetings and/or conventions not held in the local union office." J.A. 14.

The collective bargaining agreements went on to provide that during his term of office—which lasts three years—the Chairman "shall be considered to be on a leave of absence." J.A. 14. The Chairman continued to accrue credit under Caterpillar's pension and supplemental unemployment benefit plans, to be covered by Caterpillar's health insurance plan, and to earn vacation, and sick-leave and severance pay credit; in addition, the Chairman was entitled to the same paid leave as other Caterpillar employees, such as temporary military leave, bereavement leave, and jury leave. J.A. 15.

Importantly, the UAW-Caterpillar collective bargaining agreements have never required the Company to pay the wages of any union representatives other than employees elected to these grievance-handling positions. Thus, for example, the salaries of the international union representatives assigned to the Caterpillar locals—including UAW representatives who previously had worked for Caterpillar—are paid by the UAW and not by Caterpillar.

The No-Docking Provisions in Practice—Pursuant to the contractual provisions described above, for almost twenty years Caterpillar consistently permitted each succeeding employee elected Grievance Chairman to devote full time during the regular workday investigating and adjusting grievances, and participating in certain joint labor-management activities as mutually agreed, without

the Chairman with six additional hours of pay per week—the equivalent of four overtime hours at time and one-half pay, J.A. 61. This extra pay is available only for those weeks in which the Chairman "perform[s] the legitimate duties of his office," J.A. 14. (This extra pay was reported on the Chairman's weekly Caterpillar pay stub as four hours of regular pay and two hours of overtime pay. C.A. App. 438.)

loss of pay or benefits. To receive wages from Caterpillar, the Grievance Chairman submitted weekly time cards delineating the hours during his shift that he had performed his contractual functions. J.A. 55.

The Grievance Chairman maintained other employment ties as well. For example, the Chairman continued to be included on Caterpillar's seniority rolls and was listed—by his employee identification number—as an active Caterpillar employee. C.A. App. 435-36, 445. Like any other employee, the Chairman continued to use his employee "gate card" to gain access to the plant. C.A. App. 643. Like any other employee, the Grievance Chairman remained subject to discipline up to and including discharge, if he violated shop rules. C.A. App. 143. And, of course, the Chairman continued to enjoy the right to return to his former position with Caterpillar at any time.

The Grievance Chairman at Caterpillar's York facility at the time of the events that give rise to this action was Terry Orndorff. Mr. Orndorff was hired by Caterpillar in 1969 and for over twenty-one years held a variety of jobs on the factory floor. In 1990 Orndorff was elected by his fellow employees to the position of Grievance Chairman. J.A. 54. To this day, Caterpillar continues to carry Mr. Orndorff on its rolls as an active employee, as it has done since he was first hired in 1969. C.A. App. 711.

During his term of office, Orndorff worked approximately 50-60 hours per week, arriving each day at the local union hall (a mile from the plant) prior to the start of the first shift and working to or beyond the end of that shift. J.A. 84.[6] The bulk of Orndorff's time was spent investigating and adjusting grievances and in dealing with "situations to try to resolve them prior to them becoming grievances." J.A. 87. Orndorff also participated

[6] In Caterpillar's large facility in Peoria, Illinois, the grievance chairman works out of an area of the plant designtaed for his use. J.A. 16. The Union preferred a similar arrangement at the York plant, but the Company would not agree and insisted that the Chairman's office be located at the local union hall. J.A. 60.

in several joint labor-management committees. J.A. 84, 87-88.

Orndorff also performed various union functions that were outside the scope of the duties set forth in the Agreement, including participating in collective bargaining negotiations, attending workers compensation hearings, and traveling to union conferences. C.A. App. 613-14. The Local paid Orndorff for his lost time when he was performing these functions; Caterpillar did not. C.A. App. 613-14. In practice, about half of the weeks Orndorff received full pay from Caterpillar, and half of the weeks less; in total, the Local paid Orndorff roughly one-quarter of his total compensation. J.A. 71-81; C.A. App. 653-55, 705-07.

Caterpillar Discontinues Paying the Wages of the Grievance Chairman—The system as thus described functioned quite smoothly for almost twenty years, from 1973 when it was first negotiated until one year after the 1988 Agreement expired. But on October 30, 1992—in the wake of a national strike and deteriorating labor relations between the UAW and Caterpillar—Caterpillar's Director of Corporate Labor Relations, in an avowed effort to "try to gain leverage in [a] protracted labor dispute," Pet. at 2, wrote a letter to the UAW announcing that "*until a new agreement is reached,*" Caterpillar would no longer pay the lost wages for those positions denominated as full time (but would continue to pay the wages for those handling grievances on an "as needed" basis). J.A. 49 (emphasis added). Attached to Caterpillar's letter was a listing of the affected employees (replete with their Caterpillar badge number and their Social Security number) at each Caterpillar plant. J.A. 49.

In accordance with its letter, on November 17, 1992, Caterpillar discontinued paying the Grievance Chairman's wages for time spent performing his grievance-processing duties. Also true to its letter, Caterpillar continued to propose to the Union, in collective bargaining, a new agreement under which the company would resume paying the Chairman's lost time. C.A. App. 652.

On the date Caterpillar's new policy took effect, the Union filed an unfair labor practice charge with the National Labor Relations Board alleging that Caterpillar had violated § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) ("NLRA"), by ceasing to pay lost time to the Chairman without bargaining with the UAW over the issue. "In response," Pet. at 2—indeed, the day after the Regional Director of the NLRB notified Caterpillar that he intended to issue a complaint against the Company—Caterpillar commenced this action seeking to preempt NLRB action by obtaining a declaration that the lost time payments to the Grievance Chairman violated § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 ("LMRA"), and hence that such payments could not be required under NLRA § 8(a)(5).

The district court ruled for Caterpillar. The court of appeals reversed, holding that the "payments at issue here . . . certainly were protected by the first exemption contained in § 302(c)." Pet. App. 10.

SUMMARY OF ARGUMENT

The provisions of the collective bargaining agreement at issue here are an integral component of the grievance-arbitration system that is predominant in industry today and that dates back to the 1930's and 1940's. Indeed, at the time § 302 was enacted such provisions had been mandated by the War Labor Board, blessed by the Department of Labor, and in four of five organized manufacturing facilities employers allowed employees elected to union grievance-handling positions to devote part or all of their time to those functions without loss of pay.

The language of § 302 makes ample room for such agreements. Subsection 302(c)(1), in terms, permits payments "to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." All *bona fide* remunerative payments to employee-union representatives fall within this broad exemption, since all such payments, if not "compensation for service," at the very least are "by reason of" such service.

The legislative history confirms this conclusion. It shows that § 302 was enacted to limit and regulate other types of collective bargaining provisions but not those allowing employees elected to grievance handling offices to spend time on those functions without loss of pay. Indeed, such provisions were specifically called to the attention of Congress in 1947 and, far from condemning that kind of agreements, Congress recognized its legitimacy.

Sixty-years of experience belies Caterpillar's concern that these agreements threaten the national labor policy. That experience proves that unions which are formed by employees, governed by employees and whose leaders are elected by employees do not surrender their independence by negotiating in collective bargaining for paid leave for employee-union representatives. On the basis of a theoretical concern—rooted in an absolutist conception of what "independence" means—Caterpillar would invalidate vast numbers of collective bargaining agreements and turn the majority of industrial unions, and the employers with which those unions deal, into criminals.

If Congress were to conclude that—despite their long history and wide prevalence—collective bargaining agreements allowing paid leave for employee-union representatives threaten the national labor policy, Congress plainly could regulate such agreements in detail, and, in so doing, could, of course, draw such lines as sound policy were deemed to dictate. That is what the 1947 Congress did in § 302(c)(5) with respect to collective bargaining provisions for employer payments to health and welfare funds. But § 302 was not born out of a Congressional concern over the class of payments made, in the context of an employment relationship, to present or former employees who have been elected or appointed to a union position. And, the plain language of § 302(c)(1) makes that manifest by saving that class of payments from § 302's prohibition.

ARGUMENT

LMRA § 302 DOES NOT MAKE IT A FEDERAL CRIME FOR AN EMPLOYER AND A UNION TO ENTER INTO A COLLECTIVE BARGAINING AGREEMENT PERMITTING EMPLOYEES ELECTED TO A UNION OFFICE TO DEVOTE PART OR ALL OF THEIR WORKING TIME TO THEIR REPRESENTATIONAL RESPONSIBILITIES WITHOUT LOSS OF PAY.

A. The Historical Background

The provisions of the collective bargaining agreement at issue here are in no way novel or unique. Such provisions are, to the contrary, an integral component of the grievance-arbitration system that is predominant in industry today and that dates back to the 1930's and '40s.

At that time, industrial workers began to organize into unions—principally those centered around the Congress of Industrial Organizations ("CIO")—and to negotiate terms and conditions of employment suited to those industries. That innovation in worker organization demanded innovations in industrial relations as well—innovations that would assure that the rights that were being collectively bargained were enforceable and that disputes would be settled without threatening production.

With the familiarity born of experience we tend to assume that the answers that emerged to those labor relations challenges were preordained. But in fact the parties were not guided by any law of nature that dictated a particular process for workplace conflict resolution or a particular role that unions would play in that process. This was unexplored terrain.

In the end, the all but universal conclusion—arrived at through the system of free, arms-length collective bargaining fostered by the NLRA—was the creation of multi-step procedures for adjusting grievances; impartial arbitration procedures to resolve grievances that could not be adjusted; and multi-level systems of in-plant representation through which employees, elected from among their fellows, represented the group in the grievance process from the shop floor on up. These grievance procedures were designed as "devices for maintaining peace and orderly operations in the plant," reflecting the "explicit recognition by labor and management of the need for replacing unrest and dissatisfaction . . . with an agreed-upon framework for disposing of problems arising in the day-to-day relationships between the management and workers."[7]

From the very first, it was understood and agreed—as one of the negotiated features of the grievance process—that insofar as employee-union representatives devoted working time to resolving grievances through this process, that cost would be borne by the employer (at the employees' regular rate of pay) up to the point that a grievance reached arbitration. This was true with respect to the stewards in the plant's departments who devoted relatively small amounts of their time to handling grievances of employees. And, it was equally true with respect to the employees elected to positions at the apex of the grievance procedure—whether denominated as chairman, chief steward or some other title—who, *de jure* or *de facto*, devoted most or all of their time to grievance resolution.

The rudiments of this system can be found in the first collective bargaining agreement between the UAW and General Motors, the first automobile manufacturer to recognize the UAW. That 1937 labor contract, negotiated following a series of sit-down strikes and violent confrontations between GM and its workers at the Flint, Michigan plant,[8] provided for a "shop committee" in each plant comprised of "not less than five, nor more than nine members in each plant who are employees of the Company," and who were granted the right "to leave their work to investigate or adjust grievances in any department after duly notifying their foreman."[9] The first

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[7] Bureau of Labor Statistics, *Collective Bargaining Provisions: Grievance and Arbitration Provisions* at 2 (Bull. No. 908-16) (1950).

[8] *See* T. Brooks, *Toil and Trouble: A History of American Labor* at 183-85 (1964).

[9] The text of the 1937 UAW-General Motors contract is reprinted in 1 International Union, United Automobile Workers of America,

UAW-Chrysler collective bargaining agreement, signed later in 1937, likewise allowed "district committeemen" to perform certain duties "without loss of time or pay." [10]

The true breakthrough with respect to the system of in-plant representation—as with respect to so many other matters—came four years later, with the negotiation of the first collective bargaining agreement between the UAW and Ford Motor Co. That 1941 labor contract was the culmination of a four-year struggle which had begun in 1937 with the assault on UAW organizers on the overpass of Ford's River Rouge plant as those organizers were seeking to distribute leaflets to Ford employees; the organizing campaign reached a head when the employees at River Rouge went on strike to secure recognition of the UAW after which Ford agreed to an NLRB election in which over 90% of the employees voted for union representation.[11]

Following that vote, the parties negotiated an "astounding document," in which Ford agreed to match the highest rate paid by its competitors in each job category; pay time-and-one half after eight hours of work in a day or 40 hours of work in a week; pay premium pay for night work and Sunday work; and effect layoffs and recalls in seniority order.[12]

Of particular relevance here, the agreement provided for the first time for shop-floor representation—one steward (denominated a "district committeeman") for every 550 employees; a grievance committee in each building consisting of three committee members per shift; and a "plant committee" comprised of the "building chairman" in each building. And, the agreement provided that these

Agreements Entered into Between International Union, United Automobile Workers of America and Employers in the Automobile and Other Industries at 88 (May, 1937).

[10] 2 *Id.* 30.

[11] *See* I. Bernstein, *Turbulent Years: A History of the American Worker 1933-1941* at 569-71, 734-48 (1970).

[12] Bernstein, *supra*, at 748.

chairmen shall "*devote their full time to their duties as such*" and "*shall receive the same wages which were received by them on their respective jobs at the time they became building chairmen.*" C.A. App. 295 (emphasis added).[13]

The 1941 Ford Agreement set the precedent for the industry—and for manufacturing generally—in many regards. With respect to the matter at issue here, General Motors and Chrysler soon followed suit. The 1942 UAW-General Motors agreement provided for a steward system (with each steward allowed up to two hours per day of lost time), and a shop committee (with each committeeman allowed four or five hours per day depending on the size of the plant); the chairman of the shop committee was granted the right to "leave . . . work . . . at any time" without loss of pay. C.A. App. 333-35. Chrysler then adopted the same pattern.[14]

The thinking underlying the UAW's demand to allocate costs in this way—and the employers' acceptance of that demand—is clear. As Dean Shulman explained in a 1944 arbitration award under the UAW-Ford contract, "in handling grievances, stewards and committeemen are performing a service not merely for the union but for the plant as a whole." *Ford Motor Co., supra* n. 13.

The National War Labor Board, which was created by President Roosevelt by Executive Order to maintain wartime production by providing for compulsory arbitration of labor disputes, *see* Executive Order 9017 (Jan. 12,

[13] Interestingly, the 1941 UAW-Ford agreement did *not* in terms provide any pay for committeemen but only for the building chairmen. *See* C.A. App. 295. By 1944, in addition to allowing each building chairman to "devote his full time to his duties" without loss of pay, Ford agreed to allow the committeemen time off with pay "to handle grievances." *See Ford Motor Co.*, Opinion A-124 (1944), *reprinted in* H. Sulman & N. Chamberlain, *Cases on Labor Relations* at 24 (1949).

[14] *See* C.A. App. 376-77 (1943 UAW-Chrysler agreement); *see also* I. Howe & B. Widick, *The UAW and Walter Reuther* 235 (1949) (reporting that at Chrysler's Detroit plant "the chief steward devotes almost his entire day to his duties as steward").

1942), put the same point this way: "the adjustment of grievances by union representatives with the company representatives is not 'union business,' it is business in which the union and the company are equally interested," *Caterpillar Tractor Co.*, 2 BNA War Lab. Reports 75, 95 (1942), and the "steward's service is as beneficial to the company as to the employee," *Niles-Bement-Pond Co.*, 5 BNA War Lab. Rep. 489, 499 (1943). Such service, therefore, is an "expectable and legitimate industrial cost." *Goodyear Aircraft Corp.*, 13 BNA War Lab. Rep. 65, 74 (1943).

Pursuant to this philosophy, the War Labor Board ordered employers—including Caterpillar itself in the first case just quoted—to agree to contracts under which "union representatives . . . shall be permitted to handle the grievances within the plant without loss of pay," and to "negotiate the [representative's] geographical jurisdiction within the plant.' *Caterpillar Tractor, supra*, 2 BNA War Labor Report at 95.[15]

Reflecting the same basic viewpoint, in 1942, the Wage and Hour Administrator of the Department of Labor, following "discussion with representatives of both industry and labor," ruled that if "labor-management committee meetings" take place "during regular working hours," time spent by an employee-union representative in "attending them is considered hours worked and is, therefore, to be paid for in accordance with the Fair Labor Standards Act." Bureau of National Affairs, *Wage and Hour Manual*

[15] *See, e.g., International Harvester Co.*, 1 BNA War Lab. Rep. 112 (1942); *Tabardrey Mfg. Co.*, 8 BNA War. Lab. 346, 351 (1943); *Arthur J. O'Leary & Sons*, 8 NBA War. Lab. Rep. 421, 248 (1943); *McQuay Norris Mfg. Co.*, 9 BNA War Labor Rep. 538 (1943); *United States Catridge Co.*, 12 BNA War Lab. 616, 624 (1943); *Goodyear Aircraft Corp.*, 13 BNA Lab. Rep. 65, 74 (1943); *Frank Foundaries Corp.*, 14 BNA War Lab. 229, 231 (1944); *Fairchild Engine & Airplane Corp.*, 16 BNA War Lab. Rep. 633, 646-47 (1944); *Western Electric Co.*, 18 BNA War Lab. Rep. 276, 276 (1944); *U.S. Gypsum Co.*, 18 BNA War Lab. Rep. 682 (1944); *Firestone Tire & Rubber Co.*, 27 BNA War Lab. Rep. 105, 106 (1945); *Aviation Corp.*, 28 BNA War Lab. Rep. 187, 188 (1945); *E.W. Bliss Co.*, 28 BNA War Lab. Rep. 270, 272 (1945).

at 195 (cum. ed. 1944-45). And, in April, 1946, the Administrator clarified the Department's position by ruling that "time voluntarily spent in grievance conferences during regular working hours pursuant to the established grievance machinery in the plant is considered to be hours worked under the [FLSA] irrespective of whether the conference is held with a company representative or with a union representative." Bureau of National Affairs, *Wage and Hour Manual* at 45:291 (cum. ed. 1949).

The practice of negotiating collective bargaining agreements which provided for a grievance procedure, a system of in-plant representation, and paid leave for the employee-union representatives rapidly became the norm. A 1944-45 study conducted for the War Labor Board by the Bureau of Labor Statistics—which surveyed 101 large plants covering "each of the principal manufacturing industries"—found that "in four out of five plants management compensated union representatives for time spent in handling grievances during working hours," with "[t]wo thirds of tho[se] firms . . . set[ting] no specific limit on the time so spent." [16]

The approach whereby empoyers compensate employee-union representatives for grievance-adjustment time has remained an integral part of the grievance system in industrial workplaces for more than fifty years. According to the most recent study by the Bureau of Labor Statistics on this subject, such "no-docking" provisions are found in over 90% of all collective bargaining agreements negotiated by the UAW, and in more than 80% of the agreements in the "transportation equipment, electrical machinery, nonelectrical machinery, chemicals, ordnance, furniture and fixtures, communications and utilities" industries.[17]

[16] Bureau of Labor Statistics, *Grievance Procedures Under Collective Bargaining* at 1 n.2, 10 (1946); *see also* Bureau of Labor Statistics, *Union Agreement Provisions* at 152-53 (1942).

[17] Bureau of Labor Statistics, *Major Collective Bargaining agreements: Employer Pay and Leave for Union Business* at 7 (1980).

In a brief *amicus curiae* (at 18), the Council on Labor Law Equality contends that the BLS 1980 study indicates that em-

It is Caterpillar's thesis here that this deeply rooted collective bargaining practice—which was so widely prevalent when the Labor Management Relations Act of 1947 (LMRA) was enacted and which is no less prevalent today—is, through § 302 of that Act, rendered not just unlawful but criminal. According to Caterpillar, Congress enacted that section to protect employees from making a "shortsighted" decision to "approve of" collectively-bargained no-docking provisions in the belief that allowing employee-union representatives time off with pay is a "corrosive practice[] risking the growth of conflicting interests, undue influence, and the loss of a proper balance of financial independence from management and dependence upon members." Pet. Br. at 11.

The congressional determination that Caterpillar would find in § 302 is not, in fact, there. Nothing in the language or legislative history of § 302 supports Caterpillar's claim. And, while Caterpillar professes concern for the health of our system of labor-management relations, over fifty years of experiences belies Caterpillar's hypothesis that lost time payments to employee-union representatives threatens the integrity of that system. What Caterpillar is attempting here is to remake § 302 to fit

ployees elected to full-time union positions "are usually *not* paid by their employer." In fact, what the study shows is that, in addition to providing for paid leave for grievance handlers—which leave may be part-time or full-time—collective bargaining agreements also typically provide for unpaid union leave for employees elected as, e.g., local union president or employees hired to be a national union representative. *See Employer Pay and Leave for Union Business, supra*, at 20. The study also shows that with respect to various fringe benefits, such as pensions, employees granted unpaid leaves to hold union office are "often continued . . . as though the employee remained on active duty." *Id.* at 23. Thus, even with respect to unpaid leaves for union business, the practice is still for employees to receive a "thing of value" from the employer.

The UAW-Caterpillar agreement follows this pattern: it authorizes unpaid leave to "[a]ny employee who is elected or appointed to a position with the Union," and provides that "seniority shall continue to accrue" during such unpaid leave. C.A. App. 62.

its "shortsighted" effort to gain what the Company itself has stated is "leverage" in its current dispute with the UAW, p. 7 *supra*. That effort should be rejected.

B. The Statutory Language

The proper "starting point" in statutory construction is, of course, "the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* And, that rule applies with special force to a criminal statute like § 302 which must give " 'fair warning . . . to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.' " *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994).

1. Section 302 is in two basic parts. Subsections (a) and (b) are prohibitory; in particular, subsection (a)(1) states that:

> It shall be unlawful for any employer . . . to pay . . . or agree to pay . . . any money or other thing of value—(1) to any representative of any of his employees . . .[18]

But subsections (a) and (b) are in turn qualified by subsection (c) which, as enacted in 1947, stated that the "provisions of this section shall not be applicable" to five classes of payments by an employer to a representative of his employees.[19]

[18] Section 302(a) continues with a prohibition on payments to a labor organization; a prohibition on paying employees "in excess of their normal compensation" to cause the employees to influence other employees in the exercise of their rights to organize and bargain; and a prohibition on payments to a union officer if made "with intent to influence him in respect to any of his action" as a union officer. Section 302(b) goes on to prohibit any person to request or receive a payment prohibited by subsection (a).

The full text of § 302 is reprinted as an Appendix to this brief.

[19] Since 1947, four more exemptions have been added to § 302(c) as subsections (c)(6)-(9); none of these is directly applicable here

The last two paragraphs of the original subsection (c) —subsection (c)(4) & (c)(5)—permit under carefuly-defined circumstances, payments of union dues withheld from workers' pay to unions and contributions to jointly-trusteed health and welfare funds. As we shall see, these two categories of payments were the focus of congressional attention in 1947.

The first three clauses of subsection (c), in contrast, are more categorical in nature, providing that the §302(a) & (b) prohibitions shall *not* apply with respect to payments in satisfaction of judgments (subsection (c)(2)), with respect to payments pursuant to a sale made in the regular course of business (subsection (c)(3)), and, of direct relevance here:

> (1) in respect to any money or other things of value payable by an employer . . . to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employye of such employer; . . . .

As Caterpillar correctly notes, Br. at 14, throughout this litigation the parties have agreed that "the payments at issue here come within th[e] broad prohibition" contained in § 302(a), and that the determinative question is therefore whether the payments at issue are permitted by subsection (c)(1). It is our submission, which we develop below, that subsection (c)(1) exempts from the reach of this criminal statute (and leaves to other regulatory regimes) all *bona fide* remunerative payments to employee-union representatives rooted in the employment relationship.

2. At the threshold, the marked contrast between the structure of subsection (c)(1) on the one hand, and sub-

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although the last exemption—for payments to a "labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978 [P.L. 95-524, 29 U.S.C. § 175a]"—surely suggests that Congress does not condemn all employer payments to individuals performing a role like that of the Grievance Chairman here.

sections (c)(4) and (c)(5) on the other, is of significance in itself. The latter two subsections are in the nature of regulation; the exemption from criminal liability is qualified by provisos—three separate provisos in the case of subsection (c)(5)—defining with particularity the limits of the behavior Congress deemed permissible. Subsection (c)(1), in contrast, contains no such regulatory provisions; it is a blanket exemption and its draftmanship—covering money payable to either "an employee *or* former employee" and payable either "as compensation for, *or* by reason of, his service"—evinces an intent to cover, without limitation, the *universe* of remunerative payments to an employee-union representative.[20]

The words of the statutory text confirm that the payments at issue here fall within the exemption stated in subsection (c) (1).

(a) There is no doubt that the Grievance Chairman is within the class of persons to whom § 302(c)(1) permits payments. Under the collective bargaining agreement, the Chairman must be elected "from among employees in the bargaining unit," p. 2 *supra*, which means that at a minimum, the Grievance Chairman is a "*former* employee" of Caterpillar.

Furthermore, the collective bargaining agreement provides that the Grievance Chairman is "considered on leave" and has a right to return to the bargaining unit at the expiration of his term of office, p. 5 *supra*. As a result—and notwithstanding Caterpillar's assertion to the contrary, *see* Pet. at 3 n.1—the Chairman remains an "employee" of Caterpillar while on (or while "considered on") leave since the term "employee," by definition, "include[s] persons on temporary or limited absence from

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[20] As the statutory language makes plain, Caterpillar is simply wrong in asserting that subsection (c)(1) rests on the premise that "service as an employee and service as a union representative" are "mutually exclusive." Pet. Br. at 29.

work, such as employees on military duty," *Chemical Workers v. Pittsburgh Glass,* 404 U.S. 157, 172 (1972).[21]

In any event, whether considered a current employee or only a former employee, it is undisputed that the payments to the Grievance Chairman are lawful if "payable as . . . compensation for, or by reason of," the Grievance Chairman's "service as an employee or former employee" of Caterpillar.

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[21] *Pittsburgh Glass* involved the meaning of the term "employee" as used in § 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2). The term "employee" as used in § 302 has the same meaning by virtue of LMRA § 501, 29 U.S.C. § 142(3), which expressly so provides. And, while the statement quoted in text from *Pittsburgh Glass* is a *dictum*—the issue in that case was whether retirees, who are not on leave, are "employees"—the National Labor Relations Board has held from the first that individuals who are on leave from their place of employment remain "employees" within the meaning of NLRA § 2(2). *See, e.g., Soconoy Vacuum Oil Co.,* 11 NLRB 28, 34 (1939); *International Shoe Co.,* 14 NLRB 1140, 1144 (1939). *See also* 1 P. Hardin (ed), *The Developing Labor Law* 420 (3rd ed. 1992).

The court of appeals thought that the fact that the Grievance Chairman, during his term of office, does not "perform[]s services for the benefit and under the control of the employer," means that the chairman "cannot be considered [a] current employee[] of Caterpillar." Pet. at 7a. But, by definition, an employee on full-time leave for any purpose is not subject to such control by the employer during the leave, and while that fact would be relevant if the question here were Caterpillar's liability for the acts of the Chairman, the employer's relative lack of control of an on-leave employee is not relevant in determining whether the employment relationship has terminated. Indeed, if individuals who go on leave forfeited their status as employees, such individuals would not enjoy any rights under the NLRA (since NLRA § 7 confers rights only on "employees") or under a host of other federal employment laws, including the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq; the American with Disabilities Act, 29 U.S.C. §§ 706 et seq; and the Family and Medical Leave Act, 29 U.S.C. §§ 2601 et seq.

We do not pursue the point further because, as noted in text, the Chairmen in any event are "former employees" and thus their status as current employees *vel non* ultimately is beside the point.

(b) "Compensation" has a well-established meaning. *Black's Law Dictionary* (at p. 256, 5th ed.) defines compensation as "remuneration"; it is that which is received in return for service. And, this Court has made clear that the term is "broad enough to include . . . *any* economic or financial benefit conferred on the employee" in return for serGvice. *Commissioner v. Smith,* 324 U.S. 177, 181 (1945) (emphasis added).

Compensation thus encompasses not only a wage, salary, or other cognate cash payment that is made contemporaneous with the employee's service and that bears a one-to-one correspondence with such service but also payments in forms other than cash (such as payments in-kind), and payments at times other than the present (such as a year-end bonus or deferred compensation). And, the phrase "compensation for service" also encompasses pay for hours not worked—such as backpay—as "service" means "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Social Security Board v. Nierotko,* 327 U.S. 358, 365-66 (1946).

Of particular relevance here, the "total compensation package" is universally understood to consist not only of "direct pay" but also "fringe benefits," including "time-not-worked benefits and security and health benefits."[22] Indeed, in a variety of contexts, this Court has treated such fringe benefits as part of an employee's "compensation." *See, e.g., Litton Financial Printing Div. v. NLRB.* 501 U.S. 190, 210 (1991) ("severance pay . . . viewed as a form of deferred compensation"); *Davis v. Michigan Department of Treasury,* 489 U.S. 803, 808 (1989) (retirement benefits "deferred compensation for past years of service rendered"); *Foster v. Dravo Corp.,* 420 U.S.

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[22] E. Herman, A. Kuhn, R. Seeber, *Collective Bargaining and Labor Relations* 199 (2d ed. 1987). To "arrive at the total cost of an agreement," employers "calculate the many different financial components" that go into the "total compensation package." *Id.*

92, 100 (1975) (vacation benefits "a form of short-term compensation for work performed"); *United States v. Carter*, 353 U.S. 210, 217-18 (1957) (contributions to a health and welfare fund for each hour an employee worked "was a part of the compensation for work . . . done").[23]

Some of these fringe benefits, while paid at a different point in time than wages, are indistinguishable from wages in that, like wages, the benefits are tied directly to the amount of work performed. For example, an employee may, for each week worked, earn a fixed number of hours of paid time-off (i.e. vacation) or a fixed number of paid sick days.

But there are other types of "time-not-worked benefits" which employers typically promise in return for employee service and which do *not* bear a one-to-one relationship to the work performed. The "distinguishing feature" of these benefits is that "they accumulate over a period of time and are payable only upon the occurrence of a contingency." *Massachusetts v. Morash*, 490 U.S. 107, 115-16 (1989).

Most often the contingency that triggers such "time-not-worked" benefits is one "outside of the control of the employee." *Id.* For example, an employer may agree to pay benefits to an employee who becomes temporarily or permanently disabled, or who is required to care for a dependent family member. The employer may likewise pay an employee called for jury duty. Or, an employer may agree to pay supplemental unemployment insurance to an employee who is laid off. In all these instances, the employee is off work involuntarily.

Employers also provide "time-not-worked" benefits—that is, paid leave—to employees who satisfy conditions that are *within* the employee's control. For example, some employers grant paid leave to employees enrolled in educational programs, either on a part-time or full-time basis. Employers may also grant paid leave to employees who choose to perform certain civic or social responsibilities. And, as we have seen, unionized employers typically provide paid leave for an employee elected to a part-time or full-time union position within the shop.

[23] Cases like these prove that Caterpillar is simply wrong in asserting, Pet. Br. at 21, that the term "compensation" is limited to wages (and excludes "fringe benefits").

As Judge Kearse wrote in her opinion for the Second Circuit in *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046, 1049 (2d Cir. 1986), "time off to . . . tend to union duties . . . is not . . . different in kind from . . . sick leave, military leave, or jury leave" and there is no "principled distinction" which would justify excluding payments for union leave from payments permitted by the "exemption provided by" § 302(c)(1). The only possible point of contention, then, is whether *all* of these forms of paid leave—because they entail payments which are not tied directly to the hours worked as an employee performing service for the employer—fall outside the permission stated in § 302(c)(1) and thus are unlawful when afforded to an employee-union representative (or former employee-union representative). As we now show, this kind of paid leave is within—not outside of— that permission.

(c) If subsection (c)(1) authorized only payments "as compensation for . . . services as an employee," there could be room for disagreement. On the one hand, an employee qualifying for a contingent "time-not-worked" benefit—be it severance pay, educational leave, or union leave—rendered prior service to the employer under an agreement providing that the employer would pay the benefit should one of the contingencies arise, and that understanding was part of the *quid pro quo* for the employee's prior labor. That provides the strongest basis for viewing such pay as "compensation for" the employee's prior service.

Indeed, in *Bingler v. Johnson*, 394 U.S. 741 (1969), this Court held that "stipends" paid by an employer to an employee granted a full-time "educational leave of absence" for up to a year and in an amount equal to 90%

of the employee's salary were "taxable *'compensation'* rather than excludable 'scholarships,'" *id.* at 756 (emphasis added). Writing for the Court, Justice Stewart observed that "[t]he employer-employee relationship involved is immediately suggestive . . . as is the close relation between the [students'] prior salaries and the amount of their 'stipends.'" *Id.* at 756-57. The "grants are fully bargained for and in the nature of compensation," whether viewed as "deferred" compensation or "anticipatory payments" for future services to be rendered. *Id.* at 757 n.31.

To be sure, the first clause of § 302(c)(1) speaks not of "compensation" *simpliciter* but rather of "compensation . . . for his service." That formulation leaves room to argue that the words "for his service" are words of limitation which gives the phrase a narrower meaning than the term "compensation" as used in *Bingler*. On such a reading, "compensation . . . for his service" would exclude those "time-not-worked" benefits—like disability leave, educational leave, or union leave—which are contingent in nature and which do not accord with "some . . . principle of proportionality" between the work previously done and the money paid out. Pet. Br. at 30.

It is not necessary to decide here which is the better view of the phrase "compensation for service." For the permission contained in § 302(c)(1) is *not* limited to such payments. Rather, § 302(c)(1) covers any "money or other thing of value payable . . . as compensation for, *or by reason of*, [the employee-union officer's] service" as an employee.

"Because the statute is written in the disjunctive," the underlined phrase must, under settled rules of statuory construction, be given "separate meaning." *Garcia v. United States* 469 U.S. 70, 73 (1984). Congress went beyond an exemption for money payable as "compensation for service"—itself a broad class—to exempt as well payments "by reason of" service. *Black's Law Dictionary*

(at 182, 5th ed.) defines "by reason of" to mean "because of."

And, the breadth of the statutory phrase taken as a whole—payments "to an employee or former employee . . . as compensation for, or by reason of his service"—evinces an intent to cover, without limitation, the *universe* of *bona fide* remunerative payments made by an employer to its employees, whether or not the particular payment is tied to a proportional quantum of employee service.

(d) Of course, a payment to an employee-union representative may in form be remunerative in nature but in fact be "merely a sham," *Arroyo v. United States*, 359 U.S. 419, 424 (1959—the recipient's status as an employee or former employee may, in other words, be seized on as a pretext to make payments unrelated to the employment relationship. And, *Arroyo* makes plain that such "sham" payments cannot claim immunity under any of subsection (c)'s exemptions.

But no claim has been or can be made that collectively-bargained provisions which allow an employee who is elected to a particular union position (here Grievance Chairman) to receive a lost time payment which, in form and amount, is comparable to payments made to employees who hold no union office (here continued wages and benefits at the employee's regular rate), and to receive such payments regardless of how the individual performs his union responsibilities is a "sham." Rather, such payments, if not "compensation for service" are surely "by reason of" such service and hence fall within § 302(c)(1).[24]

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[24] In dissent below, Judge Alito argued that "by reason of" means "a major cause" rather than "a 'but-for' cause," Pet. App. 35a, and that therefore the continued wage payments to the employee elected Grievance Chairman are not "by reason of" that employee's service even though "[t]he chairmen's prior service as employees of Caterpillar rendered them eligible to receive their Caterpillar salaries if they were elected as Chairman," Pet. App. 38a. The argument fails on three grounds.

First, the dictionary definition of "by reason of," which Judge Alito quoted, Pet. App. 34a, is "because of" or "on account of";

3. Caterpillar proposes an entirely different reading of § 302(c)(1). Caterpillar suggests that the "plain language" of § 302(c)(1) "only permits the employer to pay what is due to the employee *in spite of, not because of*, his position as a union official." Pet. Br. at 10 (emphasis in the original); *see also* Pet. Br. at 21. As a policy proposition, Caterpillar's proposal is debatable. But the task here is not to make policy but to construe a statutory text. And, it strains the English language far beyond the breaking point to read the phrase payments "as compensation for, or by reason of, service as an employee" to mean payments "in spite of service as a union representative."

Indeed, when all is said and done not even Caterpillar is prepared to stand by the interpretation of § 302(c)(1) that the Company posits. For if that section permits only payments made "in spite of . . . service as a union representative" then it would be unlawful for an employer to pay any "money or other thing of value" to an employee

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nothing in the dictionary equates "by reason of " with "a major cause."

Second, Judge Alito's reading of "by reason of" would read that phrase out of the statute, since it is impossible to conceive of a situation in which an employee's service is the "major cause" of an employer's payment to the employee but in which the payment would not be classified as "compensation for" that service. Indeed, the core examples Judge Alito offered to give content to his definition of "by reason of" are instances of deferred proportional compensation pure and simple (e.g. vacation pay).

Third, even if Judge Alito's "major cause" premise were sound, his conclusion would not follow. On Judge Alito's approach, no contingent "time-not-worked" benefit promised to employees who render service to the employer are payable by reason of that service since for each the "major cause" is the contingency. Put simply, if the paid leave for employee-union representatives is by reason of service in union office rather than employee service, so, too, disability pay is by reason of the disability rather than by reason of employee service and jury pay is by reason of jury service rather than employee service. Surely every employer paying such benefits —and every employee receiving them—understands the employment relationship to be at least a "major" reason why the payments are being made.

who holds a part-time union position—a shop steward, for example—for time spent away from his job performing his duty as a steward. Such payments are made "because of"—not in spite of—the individual's status as a steward and thus would be unlawful under the interpretation of § 302(c)(1) Caterpillar champions. Yet Caterpillar itself has continued to allow stewards and committeemen time off "as needed" without loss of pay to attend to their union responsibilities. And, Caterpillar concedes that such payments are permissible under § 302(c)(1).[25]

Caterpillar's efforts to do business with the statutory language are thus unavailing. The payment of regular wages to an employee or former employee in a paid-leave status provided for in an employer's compensation package. including a union leave, are "compensation for, or by reason of, his service as an employee," and thus are permitted by the plain terms of § 302(c)(1).

C. The Legislative History

The legislative history of LMRA § 302 confirms this conclusion. By 1947, when § 302 was enacted, the practice of negotiating collective bargaining agreements allowing employees elected to a union grievance handling office to spend some or all of their time on union business without loss of pay was not only well-established and widely discussed, *see pp.* 10-15 *supra*, but was specifically called to the attention of Congress. Section 302 was enacted to limit and regulate other types of collective bargaining provisions, but not this type.

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[25] Caterpillar attempts to escape from the contradiction its interpretation of § 302(c)(1) creates by proposing to harmonize that section with the proviso to—but not the body of—§ 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2). We treat with Caterpillar's reliance on § 8(a)(2) *infra* at 39-41. For present purposes it suffices to note first, that the payments Caterpillar continues to make would not survive Caterpillar's own reading of § 8(a)(2); and second, that Caterpillar's reach for such an extrinsic aide demonstrates that the Company's reading of the plain language of §§ 302(c)(1) cannot stand on its own two feet.

1. The legislative history of LMRA § 302 begins in 1946 with a bill proposed by President Truman to provide for fact-finding boards to investigate major labor disputes. H.R. 4908, 79th Cong., 1st Sess. (1946). On the floor of the House, Representative Case offered an alternative proposal, H.R. 5262, 79th Cong. 1st Sess. (1946), which was adopted as a substitute for the Truman bill. 92 Cong. Rec. 1070 (1946).

The Case bill became the "direct antecedent" of the LMRA. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962). That bill contained, *inter alia*, the first version of the contract enforcement section ultimately enacted as LMRA § 301, 29 U.S.C. § 185, and of the secondary boycott cause of action ultimately enacted as LMRA § 303, 29 U.S.C. § 187. Significantly, however, the original Case bill did *not* contain any analogue to what is now § 302.

After passing the House, the Case bill was referred to the Senate Labor Committee which struck out all of the provisions Rep. Case had added and reverted to the original Truman bill. *See* S. Rep. 1177, 79th Cong. 1st Sess. (1946). Senators Ball, Taft, and Smith filed a minority report advocating six amendments, also including a version of what eventually became § 301 and § 303. *See* S. Rep. 1177, *supra*, Pt. 2, at 10-17. Again, there was no analogue to § 302 in the Republican minority's proposal.

While the Labor Committee bill was awaiting Senate consideration, the United Mine Workers ("UMW"), under the leadership of John L. Lewis, commenced a national coal strike whose principal purpose was to obtain a collective bargaining agreement requiring the mine operators to pay to the UMW, for its use in providing health and welfare benefits to miners, a royalty on each ton of coal mined. That strike—which wreaked havoc on the economy—"caused the Congress to act." *United States v. Ryan*, 350 U.S. 299, 305 (1956).

Seven weeks into the strike, the Senate suspended work on its pending business to take up the Labor Committee's bill. 92 Cong. Rec. 4806; *see id.* at 4697-4704. Senator Harry Byrd of Virginia immediately offered an amendment, *id.* at 4809, whose purpose, he said, was to "decide the issue between John Lewis and the coal operators" by "prohibit[ing] a union from exacting a royalty on production," *id.* at 4699. Section 302 "had its origin in [the] . . . amendment . . . proposed by Senator Byrd." *Arroyo v. United States*, 359 U.S. at 425 n.6. Indeed, of particular relevance here, the language of § 302(c)(1) is derived *in haec verba* from the Byrd amendment.

The Byrd amendment triggered a two-week long debate which ended only after a cloture petition was filed. 92 Cong. Rec. 5499. The focus of that debate was on the legitimacy of union-controlled welfare funds and the propriety of federal regulation on that subject.[26] "Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as 'war chests' to support union programs or political factions, or might become vehicles through which 'racketeers' accepted bribes or extorted money from employers." *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 572 (1982); *see also Arroyo v. United States*, 359 U.S. at 425-26.

Significantly for present purposes, nowhere in the debate is there even a hint of any concern over, or attempt to restrict collective bargaining agreements providing for the continued payment of lost time wages to an employee elected to a union office. Indeed, Senator Byrd described

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[26] *See, e.g.*, 92 Cong. Rec. 4891 (Sen. Byrd) (Byrd amendment is "for the purpose of prohibiting the payment of royalties to labor unions, which is the issue in the dispute between the coal miners and the coal operators"); *id.* at 5345 (Sen. Ball) (Byrd amendment "does only one thing—that is, it prevents this one-way street of the employer putting up all the money and the officials of the union spending it at their own discretion").

the thrust of his amendment in terms inconsistent with any such intent, stating that § 8(2) of the Wagner Act proscribed "any contribution by an employer to his employees *over and above their wage*," 92 Cong. Rec. 4893 (emphasis added), and that the Byrd amendment likewise "endeavor[ed] to strike at the attempt of representatives of labor to obtain payments from employers *in excess of salaries paid their employees*," *id.* at 4892-93 (emphasis added). And, with the brief exceptions noted in the margin, no mention was made of the "compensation for or by reason of" language whatsoever.[27]

The Byrd amendment (and various of the amendments that Senators Ball and Taft had proposed in their minority report) were adopted by the Senate. 92 Cong. Rec. 5739. The House acquiesced in the Senate's changes, *id.* at 5946, but the bill was then vetoed by President Truman, and the House narrowly failed to override the veto, *id.* at 6674-78.

2. At the start of the next Congress, Senator Ball introduced a series of labor law bills including one, S.55, 80th Cong. 1st Sess. (1947), which paralleled the Case bill and included (in § 201) a provision which was a slightly modified version of the Byrd amendment. When the Senate Labor Committee commenced its hearings on these and

[27] In his statement explaining the amendment, Senator Byrd stated that "[i]n some instances an employee will also be a labor representative, and there should be no prohibition from paying him his compensation for, or by reason of, his service as an employee." 92 Cong. Rec. 4891. This explanation restates the statutory text.

Senator Pepper, the leader of the opposition, suggested early in the debate that the Byrd amendment "goes entirely too far and would prohibit a railroad employer from paying money to a union for use in supporting a worker "injured by your railroad." *Id.* at 4898. Senator Ball took the floor and responded: "Mr. President, that would be compensation *payable by reason of the employee's services as an employee.*" *Id.* (emphasis added). This colloquy constitutes the only direct reference to the "by reason of" language and indicates that its proponents viewed that language as permitting payments that are not directly proportional to work actually performed.

other bills, Senator Ball explained that this latter proposal "was written in on the floor last year on an amendment offered by Senator Byrd" and "concerns so-called welfare funds which are being demanded by unions in increasing volume in collective bargaining." *Hearings on Labor Relations Program* Before the Senate Committee on Labor and Public Welfare, 80th Cong. 1st Sess. 12 (1947) ("1947 Hearings").

The Senate Committee reported a bill which to a large extent embraced the Ball bills. The Committee bill did *not*, however, include the Byrd amendment or any such provision. But on the floor of the Senate, Senator Ball re-offered his version of the Byrd Amendment and, after brief debate, that amendment was adopted.[28]

As in 1946, the only collective bargaining practice that was specifically identified as the target of the Ball/Byrd amendment was collective bargaining agreements authorizing union-controlled welfare funds.[29] And, also as in 1946, there is no hint of any intent to regulate collective bargaining agreements authorizing the payments of lost time to employee-union representatives elected to part-time or full-time union office. Indeed, as in 1946, with

[28] *See* 2 National Labor Relations Board, Legislative History of the Labor Management Relations Act of 1947 at 1302, 1304-23 (hereinafter "Leg. Hist.").

Senators Taft and Ball had filed supplemental views to the Committee report in which they advocated, *inter alia*, adding § 302 to the Committee bill; they labeled their proposed amendment a "limitation on abuse of welfare funds" and explained that it was "similar to the section in the Case bill" and that the "necessity for the amendment was made clear by the demand made last year on the part of the United Mine Workers." S. Rep. 105, 80th Cong. 1st Sess. at 52 (1947), *reprinted in* 1 Leg. Hist. at 458.

[29] *See, e.g.*, 2 Leg. Hist. at 1305 (Sen. Ball) ("the *sole purpose of* the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds") (emphasis added); *id.* (Senator Byrd) ("the amendment . . . has a specific purpose which is to prohibit the labor unions from requiring welfare funds to be paid into the treasuries of the labor unions"); 2 *id.* at 1312 (Sen. Taft) ("[t]he purpose is to prevent the abuse of welfare funds").

the exception of another brief reference, § 302(c)(1) received no mention whatsoever.[30]

In conference, the House accepted the Ball amendment. One important change was made, however: a new exemption was added, as subsection (g), saving preexisting welfare funds from the limitations contained in subsection (c)(5) and permitting such funds to continue as union-controlled entities. *See* 2 Leg. Hist. at 1544 (Sen. Taft).

3. The absence of a word of congressional condemnation of collective bargaining agreements allowing part-time or full-time employee-union representatives to perform their responsibilities without loss of pay is especially telling because such agreements were specifically brought to the attention of Congress in its comprehensive examination of labor relations and labor law in 1947. Indeed, this topic was raised on the very first day of the Senate Labor Committee's hearings by the very first witness (following a courtesy appearance by the Secretary of Labor), Professor Leo Wolman.

The focus of Professor Wolman's testimony was on a bill Senator Ball had introduced to amend the Wagner Act. *See* S. 360, 80th Cong. 1st Sess. (1947). Among the changes proposed by that bill was the addition of a proviso to the remedial section of the Wagner Act stating that "no order [of the NLRB] shall require any action by an employer with respect to any labor organization which under similar circumstances would not be required with respect to a labor organization national or international in scope." S. 360, *supra*, at 14. Professor Wolman strongly supported that proposal.

In explaining his support, Wolman argued that the NLRB was applying a double standard when it came, *inter alia*, to the matter of payment of wages to employee-

[30] In describing his amendment Senator Ball summarized subsection (c)(1)'s legislative language in short-hand terms as allowing payments "on account of wages actually earned." 2 Leg. Hist. at 1304.

union representatives. According to Wolman, in the case of national unions, but not in the case of nonaffiliated (i.e. company-specific) unions, the Board was of the view that "when union officials are paid by employers, that practice is not considered to be domination." 1947 Hearings at 98. In Wolman's view, "there are very few unions in the United States which would survive today on their present scale and carry on their activities unless the employers paid a considerable part of the union's expenses." *Id.* Wolman continued:

> I was just reading in the newspaper that the Chrysler Corporation is negotiating a new contract with the UAW. One of the company's demands was that it no longer be required to pay wages to union stewards for union work. These payments amount currently in Chrysler to about $300,000 a year.
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> SENATOR BALL: Dr. Wolman, did you mean that in this Chrysler contract instance, the company was required to pay the salary of the union stewards?
>
> DR. Wolman. Yes.
>
> SENATOR BALL: *While they were devoting most of their time to union business; is that right?*
>
> DR. WOLMAN: Yes. *And it is a very limited amount of time that they give to anything but union business.* It is also one of the frequent demands of unions that the number of such officials be increased. [1947 Hearings at 99; emphasis added]

Senator Ball returned to this topic at the very end of the Senate hearings. When Gerald Reilly, a former NLRB member and an advisor to Senator Ball in drafting Ball's bills testified, the Senator noted the testimony about Chrysler Corp "pay[ing] . . . union stewards . . . salary and time spent on union business" and asked whether the Labor Board had ever ruled on "whether that is a violation of section 8(3)."[31] 1947 Hearings at 2051. Reilly

[31] That Senator Ball asked only about a potential violation of NLRA § 8(3)—the anti-discrimination provision of the Wagner

answered by referencing "the first Ford contract . . . with the UAW union"—the seminal, 1941 contract which had, in terms, permitted "building chairmen" to "devote their full time to their duties as such," p. 13 *supra*—and stated:

> *That contract set a precedent throughout the automobile industry.* The offhand judgment of the Board at that time was that it was pretty close to being financial support. No one ever filed any charge against the union. So the matter never was adjudicated.
>
> The theory is that if a steward is working on grievance work during working hours he is entitled to do so without loss of pay. The statute says that under regulations provided by the Board that may be done. Now, the Board has never written any regulations on that point. So it is quite conceivable that the whole practice is illegal. In view of the rather rapid development and the abuses, it might be proper for Congress to indicate applicable regulations on that whole problem of paid stewards. [1947 Hearings at 2051; emphasis added]

Senator Morse—who as a Member of the War Labor Board had authored the first decision requiring pay for employee-union representatives, *see International Harvester, supra* n.15—responded with the well-understood rationale for the practice: when a steward "is functioning on settlement of grievances on the job he is working for employers too" and, if effective, "would probably save the company tremendous sums of money." 1947 Hearings at 2052. Reilly readily agreed that "it is all right when the steward is working *full time* on settlement," but went on to take issue with "lots of situations" in which "the contract rather arbitrarily provides for there being a certain number of stewards who do not have any other duties than handling grievances." *Id.* (emphasis added).

Act—and not about § 8(2) underlines how for fram reality Caterpillar is here in its insistance that the payments Chrysler was making to UAW stewards make the UAW a company-dominated union within the intendment of § 8(2).

4. Notwithstanding Mr. Reilly's suggestion that Congress go beyond the bills then before the Labor Committee (including the Ball bill containing what became § 302) and enact "applicable regulations on that whole problem of paid stewards"—and notwithstanding the fact that, shortly after his testimony, Reilly became the Senate Labor Committee's Special Counsel[82]—neither the Committee nor the Senate chose to take up this invitation. Indeed, there is no evidence that even a single Senator or Representative desired to do so.

Instead, the Labor Committee focused on the "double standard" Professor Wolman had identified and broadened the proviso Senator Ball had proposed to NLRA § 10(c) so as to limit not only the NLRB's remedial authority but also to require the Board "in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases" to proceed "irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope." Senator Ball explained that the point was "to treat affiliated and nonaffiliated independent unions exactly the same." 2 Leg. Hist. at 1103.

The House in 1947 would have gone even further in the same direction. The House passed a bill that would have relaxed § 8(a)(2)'s prohibition on financial support so as to apply only to corruptly-motivated payments. H.R. 3020, 80th Cong. 1st Sess., 1 Leg. Hist. at 177. And, while the House conferees acquiesced in the Senate's decision not to amend § 8(a)(2) proper, they did so on the understanding, articulated in the House Managers Statement accompanying the Conference Report, that the Senate amendment to § 10(c)—which was broader than the House analogue—would "*allow shop stewards without losing pay to confer not only with the employer but with the employees as well, and to transact other union business in the plant as well.*" H.R. Rep. 510, 80th Cong. 1st Sess.

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[82] Reilly, *The Legislative History of the Taft-Hartley Act*, 29 G.W. L. Rev. 285, 294 n.14 (1966).

at 40, 1 Leg. Hist. at 544 (1947) (emphasis added).[33] The House conferees explained:

> The House bill amended section 8(2) . . . for the purpose of according some protection to labor organizations which were not affiliated with one of the national or international labor organizations. This provision of the House bill had the effect of permitting an employer to do the same kinds of things for independent unions which the Board has permitted him to do for the affiliated unions.
>
> . . . The Board has, for example, in the case of affiliated unions permitted employers to provide bulletin boards in their plants for the union's use, to give union officials preferred treatment in laying off workers and calling them back, *and to allow shop stewards without losing pay to confer not only with the employer but with the employees as well, and to transact other union business in the plant*. The Board has not permitted the employer to do the same things for nonaffiliated unions, and it was the purpose of the House provision to provide for equality of treatment in this respect.[34]

[33] The House bill, like the original Ball bill, *see* p. 32 *supra*, had provided that "No order of the Board shall require or forbid any action by an employer with respect to any labor organization that in similar circumstances would not be required or forbidden with repect to a labor organization national or international in scope." 1 Leg. Hist. at 196. As thus drafted, this provision of the House bill limited the NLRB's remedial authority but did nothing more. The Senate language—limiting the NLRB in issuing complaints and in adjudicating cases—went further and satisfied the House conferees.

[34] In the House Labor Committee report which had accompanied the bill reported to the floor, the Committee had stated that "[e]mployer generally provide in their plants bulletin boards for the union's use, give union officials preferred treatment in laying off workers and in calling them back, and allow representatives of the union, without losing pay, to confer not only with the employer but as well with employees, and to transact other union business in the plant." H.R. Rep. 245, 80th Cong. 1st Sess. at 28-29 (1947), 1 Leg. Hist. at 319-20. The House Committee expressed the view that "day-to-day relations between employers and unions require"

> Since this matter is adequately dealt with in the provisions in sections 9 and 10 [of the Senate bill], the conference agreement omits the provisions of the House bill . . . [H.R. Rep. 510, *supra*, at 40-41, 1 Leg. Hist. at 544-45; emphasis added]

5. The lessons that emerge from the legislative history are these:

First, nothing in the extensive debate over the Byrd amendment in 1946, or the more truncated debate over the Ball amendment in 1947, evidences an intention to uproot—much less criminalize—the pervasive practice of the parties, in collective bargaining agreements, to provide that employee-union representatives are to be paid lost time wages for grievance handling and cognate union representational activity. What Congress feared in 1947 was unions like the UMW that were too strong, not unions that were too beholden to management. The evil against which § 302 was aimed was thus agreements providing for union-controlled welfare funds and the like, not other types of collective bargaining agreement provisions. The lesson of *Finnegan v. Leu*, 456 U.S. 431, 441 n.12 (1981), applies here as well: it is "virtually inconceivable that Congress would have prohibited [a] long-standing [labor management] practice . . . without any discussion in the legislative history of the Act."

Second, the legislative materials with respect to the amendments to the NLRA made at the same time and in the same piece of legislation as § 302 show that: the 1947 Congress was well-aware that collective bargaining agreements generally provided that part-time and full-time employee-union representatives were being paid lost time wages while performing their union duties; Congress was invited to frame specific, limiting regulations "on that whole problem"; and Congress declined that invitation in favor of legislation reflection congressional *approval* of such payments and congressional *support* for assuring that

such practices, and denounced the Board for allowing only national unions to "enjoy these and other advantages." *Id.*

unaffiliated unions enjoy the same privileges as national unions in this regard.

Caterpillar is thus reduced to arguing that Congress, at one and the same time, recognized the legitimacy of no-docking agreements yet moved to make payments pursuant thereto a felony. And, Caterpillar must further contend that even though Congress exempted preexisting agreements providing for union-controlled welfare funds from the reach of § 302, Congress, *sub silentio,* concluded that collectively-bargained wage-continuation provisions were so much more pernicious that not even preexisting agreements deserved any shelter. Those arguments collapse of their own weight.

6. The interpretation of § 302 that we urge is supported not only by its text and legislative history, but by fifty years of subsequent developments as well.

(a) Perhaps most probative of all are the contemporaneous understandings of § 302, and none more so than that set forth by the National Association of Manufacturers in an issue of the *NAM Law Digest* on the LMRA which was published in June, 1947, immediately after the law's enactment. Noting that "it is sometimes a practice for employers to pay union stewards or other union officials for time spent during a part or the whole of a working day on union business, handling grievances, negotiating or other matters," the NAM posed the question of whether "such activity is a legitimate 'service' . . . and thus within the exception under subsection (c)(1)." National Association of Manufacturers, *NAM Law Digest* at 73 (June, 1947). The NAM answered that question as follows: "*The legislative history of the Section seems to support the view that it is since there is no indication of any intent to disturb existing employer-employee practices not extortionate in nature.*" *Id.* (emphasis added).

The Department of Labor came to a similar conclusion shortly thereafter. In 1948, the Wage and Hour Administrator of the Department of Labor concluded that the enactment of § 302 did *not* affect his prior ruling, *see*

pp. 14-15 *supra,* that the Fair Labor Standards Act *requires* pay for employee-union representatives for time spent during regular working hours in adjusting grievances. *Wage and Hour Manual, supra,* 45:291 (1949 ed.).

The parties to the collective bargaining process—employers and unions alike—manifested by their actions a similar viewpoint. If, as Caterpillar contends, § 302 was intended to affect a sea change in the practice of paying employee-representatives for time spent on union business—and to create criminal liability for such payments—employers and unions missed the point completely since they continued to negotiate such agreements under the newly-enacted law.[35]

(b) Beginning in the 1950's, the National Labor Relations Board weighed in, albeit in the context of cases brought under §§ 8(a)(2) and (a)(5) of the NLRA.

Section 8(a)(2) makes it an unfair labor practice for an employer to "contribute financial or other support" to a labor organization. A "quite narrow" proviso, Pet. Br. at 40, allows an employee to confer with his employer without loss of pay. Because of the narrowness of the proviso, the NLRB was called upon to decide whether payments to employee-union representatives, which could not claim *per se* immunity under the proviso because not limited to time spent in meetings with management, were unlawful as "contribut[ions of] financial support"—under § 8(a)(2). The NLRB repeatedly answered that question "no."

For example, in *Hannaford Bros. Co.,* 119 NLRB 1100, 1101 (1957), the Board held that the employer's practice of paying committeemen for time spent on com-

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[35] *See, e.g.,* Bureau of Labor Statistics, *Labor-Management Contract Provisions 1950-51* 8-9 (Bull. No. 1091, 1951); Bureau of Labor Statistics, *Collective Bargaining Clauses: Company Pay for Time Spent on Union Business* (Bull. No. 1266, 1959); Bureau of Labor Statistics, *Major Collective Bargaining Agreements* 26-30) (Bull. No. 1425-1, 1964).

mittee business is "not sufficient to constitute financial or other support proscribed by Sections 8(a)(2) and (1)." In *Sunnen Products,* 189 NLRB 826 (1971), the Board likewise upheld the practice of permitting an independent union to hold its monthly board meetings during working hours without loss of pay; the Board described this as the kind of practice that "serve[s] to permit an otherwise legitimate labor organization to perform its functions for the benefit of all concerned more effectively than otherwise might be the case," *id.* at 828. And, in *Axelson, Inc.,* 234 NLRB 414 (1978), *enf'd,* 599 F.2d 91 (5th Cir. 1979), the Board held—with the approval of the Fifth Circuit—that the employer in that case had committed an unfair labor practice by unilaterally abandoning its past practice of paying union representatives for time spent in negotiations; in the Board's view "the payment of wages to employees negotiating a collective bargaining agreement . . . is . . . a mandatory subject of bargaining." *Id.* at 415.

The Board gave the matter its fullest treatment in *BASF Wyandotte Corp.,* 274 NLRB 978 (1985), *enf'd,* 798 F.2d 849 (5th Cir. 1986). There the Board upheld an agreement which permitted union officers four hours per day of paid union leave, explaining:

> The use of company time and property does not per se establish unlawful employer support and assistance. "Where a union lawfully has been established as the employees' bargaining representative, and has been accorded lawful recognition by an employer who, following recognition, deals with that representative at arm's length," the Board has regarded the use of company time and property, in the absence of deeper employer involvement or intrusion in union affairs, to be merely "friendly cooperation growing out of an amicable labor management relationship." . . . "[T]o require employers to follow a practice of docking employees for brief periods of time spent in conference with a union representative whose duty it is to service employees in an organized plant would often create an abrasive and wholly unnecessary interfer-

> ence with a healthy contractual relationship. [*Id.* at 980; citations omitted] [36]

The Board in *BASF Wyandotte* went on to consider the employer's claim that it was privileged to refuse to make the payments at issue because such payments would violate § 302. The Board rejected that argument, concluding that the payments "are encompassed within the exception set forth in Section 302(c)(1) for payments made as compensation for, or by reason of, the services of union officers as employees of the employer." 274 NLRB at 979. The Board added:

> We note that a contrary holding . . . would be inimical to the statutory goal of encouraging cooperative labor relations. Moreover, such privileges in themselves hardly amount to bribery of employee representatives or extortion of employers, the evils at which Section 302 is aimed. [*Id.*] [37]

Finally, it bears noting that in a series of decisions spanning more than thirty years, the lower courts have repeatedly upheld agreements like the one at issue here.[38]

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[36] Against this background, Caterpillar could not be more wrong in relying on § 8(a)(2) to support its attempt to invalidate all collective bargaining agreements providing for lost time pay to employee-union representatives save those limited to pay for time spent in meetings with management.

[37] *See also National Fuel Gas Distribution Corp.,* 308 NLRB 841 (1992). There the Board found no § 302 violation in an agreement pursuant to which employees on full-time leave to hold union staff positions continued to accrue pension credits and which required the employer to make matching contributions into the pension plan on behalf of these employees. The Board held that these "constitute compensation 'by reason of' services performed for the [employer]." *Id.* at 844.

[38] *See BASF Wyandotte Corp. v. Chemical Workers,* 791 F.2d 1046 (2d Cir. 1986); *NLRB v. BASF Wyandotte Corp.,* 798 F.2d 849 (5th Cir. 1986); *Herrera v. UAW,* 73 F.3d 1056 (10th Cir. 1996); *CWA v. Bell Atlantic,* 670 F. Supp. 416 (D.D.C. 1987); *UAW v. CTS Corp.,* 783 F. Supp. 390 (N.D. Ind. 1992); *IBEW v. National Fuel Gas,* 16 Employee Benefits Cases (BNA) 2018 (W.D. N.Y. 1993); *Employees Independent Union v. Wyman Gordon,* 314

(c) Against this background, the words of *United States v. Emmons*, 410 U.S. 396, 410 (1973), are especially apt: "It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction . . . its action would have so long passed unobserved."

D. Caterpillar's Arguments of Policy

Faced with the statutory language of subsection (c)(1) which by its terms makes ample room for paid leave for employee- union representatives, and lacking any evidence in the legislative history that Congress intended to condemn this well-established practice, Caterpillar is relegated to arguments of policy. Those arguments are unavailing.

1. At the threshold, it is important to note that Caterpillar does not even attempt to claim that collective bargaining agreements providing for paid leave to employees holding union office constitute a form of "corruption of collective bargaining through bribery . . . extortion or . . . abuse of . . . power"—the evils against which § 302 has heretofore been understood to be aimed. *Arroyo v. United States*, 359 U.S. at 425-26.

Instead, donning the mantel of protector of employee rights, Caterpillar asserts that "[i]n addition to preventing bribery, extortion, and secret deals," § 302 should be understood to "erect a firm financial barrier" against payments from employers to employees elected to union office" in order "to preserve the independence of labor from management, a fundamental tenet of American labor policy," and "to ensure that control of the purse strings of labor organizations remain firmly in the hands of the union members themselves," Pet. Br. at 16-17.

There is no small irony in the fact that Caterpillar's professed concern over the "independence of labor" comes

F. Supp. 458 (N.D. Ill. 1970); *United States v. Motzell*, 199 F. Supp. 192 (D.N.J. 1961). *See aslo Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989) (dictum); *United States v. Phillips*, 19 F.3d 1565 (11th Cir.), *cert. denied*, 514 U.S. 1003 (1994) (dictum).

in the midst of a now six-year long battle between the UAW and Caterpillar in which the UAW has pursued every available avenue to pressure Caterpillar into abiding by the labor standards negotiated for employees in the agricultural implement industry. That struggle has entailed two national strikes, one lasting more than five months and another lasting seventeen months, as well as hundreds of smaller skirmishes. Caterpillar's stated desire to vindicate the independence of the UAW and other unions rings hollow, indeed.[39]

2. There is no doubt that, as Caterpillar puts it, the " 'dividing line between management and labor [is] fundamental to the industrial philosophy of the labor laws in this country,' " *id.* at 17, *quoting NLRB v. Hendricks County*, 454 U.S. 170, 193 (1981) (Powell, J., concurring in part and dissenting in part). And, the respondent Union would be the last to denigrate the importance of trade unions which are independent of management and controlled solely by their members. But the fact of the matter is that sixty years of experience belies Caterpillar's absolutist conception of the requisites for "independence of labor from management," and proves that unions which are formed by employees, governed by employees, and whose leaders are elected by employees do not surrender their independence by negotiating in collective bargaining for paid leave for employee-union representatives.

As we have seen, from the very start of industrial unionism men like Walter Reuther—who put their lives on the line to organize workers in the automobile, steel and other mass-production industries of the day—negotiated arrangements to allow workers elected to grievance-handling positions to devote full time to those responsibilities without loss of pay. Surely no one can seriously contend that Reuther and his compatriots were acting for

[39] *Cf. Auciello Iron Works Inc. v. NLRB*, —— U.S. ——, 116 S.Ct. 1754, 1760 (1996) ("an employer's benevolence as its workers' champion against their certified union" should be viewed with "suspicion").

and on behalf of management rather than for and on behalf of the workers they represented.

Nor can it sensibly be maintained that each and every one of the major industrial unions—including not only the UAW but also, e.g., the Communications Workers, Machinists, Rubber Workers, Utility Workers and Steelworkers—are not now, and have never been, labor unions independent from management.[40] Certainly, Caterpillar points to no empirical evidence to support its hypothesis that unions which negotiate no-docking arrangements—including every major industrial union—are not independent unions in fact and in deed.

3. In the face of this rich historical experience, Caterpillar stands on pure theory. The (unstated) major premise underlying Caterpillar's theoretical argument is that the cost of the time spent by employee-union representatives in adjusting grievances is, in the very nature of things, an expense of the union, and that by allowing these representatives to work on grievances during their working hours without loss of pay, an employer is necessarily subsidizing the union.[41]

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[40] In the UAW, CWA, Machinists, Rubber Workers and Utility Workers, at least 80% of their collective bargaining agreements provide for employer pay for employee-union representatives. *See* Bureau of Labor Statistics, *supra* n.14, at 6. For the Steelworkers, the comparable figure is 48%. *Id.*

[41] The minor premise of Caterpillar's argument is that an employer contribution towards an expense that is inherently a "union" expense will corrode the union's independence. But it is far from clear, even in theory, that unions which are established and governed by workers—and whose leaders are elected only by the member-workers and accountable only to them—will forfeit their independence if they are less than 100% self-sufficient.

Indeed, on Caterpillar's theory, not only are there no truly independent industrial unions, there also are no independent public defenders, since public defenders are paid by the state to oppose the state in adversarial proceedings. Nor, on Caterpillar's theory, can trustees who are paid by a union or employer be expected to discharge their fiduciary duty without regard to the interests of the party paying them. *But cf. NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (trustees "bear[] an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties" and are *not* "representatives" of the party appointing or paying them).

As we have seen, however, the premise of those who created the system of grievance processing and industrial workplace representation—and whose commitment to trade union independence is beyond question—was quite different. In their view, the problem-solving, peace-keeping aspect of that system is good for employers and unions alike, and the work of administering that system is on a par with the work production employees perform for the enterprise.

Thus, the pioneers of industrial unionism—and those who have followed in their footsteps—negotiated for arrangements to allow the work of day-to-day grievance adjustment to be done by production workers chosen by their fellows and to assure that these workers could perform that work during their normal working hours without loss of pay. The agreements thus negotiated served to both legitimize the role of the employee-union representatives and also made it possible to institutionalize a system of worker-run, in-plant representation—a system which assures that employee-stewards will be accessible to every worker in the workers' individual departments while at the same time assuring a measure of plant-wide coordination through the grievance committee and the employee-grievance chair. And, this was done without compromising the independence of these industrial unions because the cost of the lost time was seen as a proper *enterprise* cost and not one that, by reason of the theory of independent unionism, must be borne by the union and its worker-members.[42]

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[42] Caterpillar thus could not be more wrong in suggesting that the "distinction" between a "full-time union representative who was [an] employee" and union officials "who were never employees of the employer" is an "irrational distinction." Pet. Br. at 25. The policies underlying § 302 could well be undermined if unions could demand that employers add to the payroll, and pay, those who have never done any work for the employer, *cf. Reinforcing Iron Workers*

4. The practical consequences of embracing Caterpillar's proposed reading of § 302(c)(1) would be profound. Overnight, vast numbers of collective bargaining agreements would be invalidated and the overwhelming majority of industrial unions, and the employers with which those unions deal, would be turned into criminals—indeed, felons.

Perhaps in recognition of the labor-management cataclysm its argument entails, in the final moment Caterpillar loses the courage of its convictions and proposes "some indulgence when applying section 302 to active employees who perform representative services on the shop floor." Pet. Br. at 45. But Caterpillar's reading of § 302(c)(1) allows for no such "indulgence": if, as Caterpillar maintains, § 302(c)(1) permits only payments "in spite of" an employee's status as a union representative—and if, as Caterpillar also maintains, the only exception is for payments authorized by the proviso to § 8(a)(2)—then lost time payments for time spent on representational tasks are illegal regardless of whether the recipient also spends part of the day on production work.[43]

Local Union 426 v. Bechtel Power Corp., 634 F.2d 258 (6th Cir. 1981); those same dangers simply are not posed—and, as explained in text, important interests are furthered—by continuing wage payments to employees elected to part-time or full-time union office.

At the same time, the practice of paying employee-representatives their regular wages undoubtedly contributed, and continues to contribute, to the willingness of employees to seek and hold such positions; it is questionable how many workers would be willing to do so if accepting a union position meant giving up the employer's health insurance, pension plan and the like. (Indeed, on Caterpillar's reading of § 302, it is not even clear that an employer can grant an employee elected to union office an unpaid leave with the right to return, since that right itself is arguably a "thing of value" under § 302(a).)

[43] To support the distinction it proposes between employee-union representatives who take time off as needed to adjust grievances and those who, *de jure*, devote their full time to doing so, Caterpillar states that "[t]he full time union official, whether or not he *was* an employee of the employer, *is* not an employee." Pet. Br. at 47 (emphasis in the original). Even if it were true that taking a leave of absence terminates the employment relationship—and it is not, *see* pp. 18-19 *supra*—§ 302(c)(1), in terms, permits payment to present *or former* employees, rendering the present status of the recipient besides the point.

Caterpillar also argues that the Company "does not have the power or right to control or to direct how the full-time union officials perform their duties." Pet. Br. at 49. But Caterpillar is equally powerless to "control or to direct" how *part-time* union officials perform their *representational* duties. This, too, then, cannot explain the distinction Caterpillar seeks to draw.

Moreover, the distinction Caterpillar proposes—allowing pay for employee-union representatives who take time off "as needed for fellow employees" but not to those who devote full-time to assisting fellow employees—would lead to mind-bending problems of line-drawing. Suppose an employee-representative finds it necessary to devote one full day to assisting fellow employees; may such an employee be paid her regular wages? What if the representative finds it necessary to devote one full week, or month to representational functions; at what point does the individual cross the line Caterpillar would draw? Conversely, can an employee-union representative avoid being considered "full time" by working one hour per day in the plant? One hour per week?

These are not just theoretical concerns. The fact of the matter is that in large plants with a large volume of grievances, employee-union representatives at the higher stages of the grievance process can and do find it necessary to devote most if not all of their working hours to their grievance processing responsibilities. That was the case at Caterpillar. Indeed, that was at least part of the reason the parties agreed to create a limited number of *de jure* full-time grievance handling positions. And, the line Caterpillar proposes is not only unprincipled but impractical as well.

5. That brings us to the final failing of Caterpillar's argument. One of the geniuses of the collective bargaining system is precisely that it enables the parties to arrive at practical solutions to practical problems. An employer

and a union might well conclude, for example, that it is better for all concerned to have one grievance chairman devoting full time to grievance processing than, e.g., to have four committeemen each devoting two hours a day to their representational responsibilities.

After all, allowing one representative full-time for such work is likely to be far less disruptive of production than authorizing four employees to spend part of each day on union work. And, one full-time grievance representative may well become more adept at resolving grievances effectively and efficiently than four individuals who spend only two hours per day adjusting grievances. Yet, on Caterpillar's theory, § 302 imposes a straitjacket which somehow allows for the part-time arrangement yet prohibits—indeed criminalizes—the full-time arrangement.

Congress is, of course, free to adopt such a regime if it so desires. But if Congress were to focus on this area, Congress could—and undoubtedly would—make a set of nuanced, policy distinctions that are peculiarly the province of the legislative branch. Indeed, the 1947 Congress, focused as it was on welfare funds, *see* pp. 30-31 *supra*, did just that in LMRA § 302(c)(5)—the subsection which deals specifically with such funds. Rather than banning collective bargaining over the creation of such funds, Congress instead enacted rules with respect to, e.g., the permissible purposes of welfare funds and such funds' permissible form and structure. Congress in striking the regulatory balance even went so far as to grandfather union-controlled welfare funds in existence as of 1947 and to apply § 302(c)(5) only prospectively.

Congress followed a similar, and even more directly relevant, tack in 1978 in enacting the Civil Service Reform Act ("CSRA"), 5 U.S.C. §§ 1201 *et seq*. The 1978 Congress deemed it appropriate, in extending collective bargaining rights to federal employees, to treat in detail with the issue of paid time (denominated "official time") for federal employee-union representatives. Accordingly, CSRA § 7131 distinguishes between—and adopts different

rules governing—four discrete categories of paid leave: (i) leave used "in the negotiation of a collective bargaining agreement" (which the CSRA requires employees be granted); (ii) leave "relating to the internal business of a labor organization" (which the CSRA forbids); (iii) leave to "participat[e] . . . in any phase of proceedings before the [Federal Labor Relations] Authority (which the FLRAA may require); and (iv) all other types of leave. As to the last category, the judgment Congress made was to permit the parties, by agreement, to grant "any employee representing an exclusive representative . . . official time *in any amount* the agency and the exclusive representative involved agree to be reasonable, necessary and in the public interest."

Of course, because § 302 was enacted thirty years before the CSRA, the latter cannot control the interpretation of the former. But the CSRA, like any subsequently-enacted law, can at least " 'throw a cross light' on the earlier enactment," *Michigan Nat. Bank v. Michigan,*" 365 U.S. 467, 481 (1961) (*quoting* L. Hand, J.). And given that "the basic assumption underlying collective bargaining in both the public and the private sector [is] that the parties 'proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest,' " *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107-08 (1983), *quoting, Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960), the fact that the 1978 Congress that enacted the CSRA saw no conflict between the CSRA labor relations system and the provision of "official leave" for employee-union representatives certainly proves that Caterpillar's reading of § 302 is not necessary " 'to ensure the integrity' of the collective bargaining system." Pet. Br. at 16.

5. The short of the matter is this. If Congress were to conclude that, despite their long history and wide prevalence, collective bargaining agreements allowing paid leave for employee-union representatives threaten the national labor policy, Congress plainly could regulate such

agreements, either by prohibiting such agreements *in toto* or by drawing whatever lines Congress deemed appropriate. But Congress simply has not done so. That was not what § 302 was about. And, the point of § 302(c)(1) is to exclude from the ambit of § 302 the class of payments made, in the context of an employment relationship, to present or former employees who have been elected or appointed to a union position.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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APPENDIX

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§ 301. Restrictions on financial transactions

(a) Payment or lending, etc, of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employee in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress;

(3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of snch fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administraton of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United

States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal services shall be furnished; (A) to initiate any

proceeding dircted (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industry-wide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of

not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.